IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-113

ROBERT LYNN BOYD,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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1

Petitioner's conviction was affirmed in an unpublished opinion which is attached hereto as Appendix I.

2

On March 20, 1978, the California Court of Appeal, Second Appellate District Division Three, affirmed Petitioner's conviction for one count of grand theft, one count of robbery, and six counts of receiving stolen property. A copy of that

opinion is attached to this Petition as Appendix I. On April 12, 1978, the Court of Appeal denied a Petition for Rehearing. A copy of the order is attached to this Petition as Appendix II. On May 18, 1978 the California Supreme Court denied a Petition for Hearing. A copy of the order is attached as Appendix III. This Court has jurisdiction over this case by reason of the provisions of 28 U.S.C. § 1257(3). Petitioner's conviction was affirmed by the highest court of the state of California required to hear Petitioner's appeal, and the California Supreme Court, which has discretionary power to hear Petitioner's appeal, refused to grant a hearing.

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL BASED UPON PROSECUTORIAL MISCONDUCT

Petitioner submits that the prosecutor's actions in this case constituted irregularities amounting to dishonesty, deception, or reprehension as contemplated by Berger v. United States, 295 U.S. 78, reiterated in Singer v. United States, 380

U.S. 24. Petitioner submits the following actions for support of his position:

1. The prosecutor twice placed himself in the position of conflict by being an investigator and visiting and interviewing the People's witnesses, Kunicks and Blackmans, and when portraying photographs for identification purposes to such witnesses.

2. During a recess, the prosecutor brought a witness, Mr. Gutierrez, into the courtroom and had him sit down. Only Petitioner and two codefendants were sitting at counsel table. The prosecutor stated he was unaware the witness was present in the room.

At this time, the trial court made the following comment:

> "What the court said and what the court will reiterate is for the first time I began to doubt your motives and the reason I said that, Mr. Marcus, was because at that moment, you stripped counsel table of everyone but the defendants and had the witness to stand there and look at the defendants. But the fact is, Mr. Marcus, that throughout this trial, from the first trial and up until today, on different occasions, certain

things have unfortunately slipped your mind. And this last incident does pose a serious problem as I see it. I am going to have to reconsider Mr. Smith's motion just to see whether or not it really made any difference and I think perhaps you ought to join in that motion in order to clarify your position."

"And I am only talking about the various incidents where inadvertently certain things that defense counsel have requested have somehow or another not been revealed at the time the law would indicate it should be revealed."

Clearly, Mr. Gutierrez's identification testimony was critical as to the robbery count, and allowing him to view Petitioner was misconduct on the part of the prosecutor.

3. There were multiple problems with the prosecutor's failure to provide timely discovery, particularly regarding items he had in his possession, long before turning them over to counsel. The trial court made the following comment:

"One other thing, Mr. Marcus, I want you to search your records and what you have left for this trial and make sure that you don't have any hidden discovery that you failed to show counsel. I don't expect at any further point in this trial that

any other items that should have been turned over to defense counsel have been inadvertently overlooked."

In this case, the court had been referring to the fact that the prosecutor had failed to inform defense counsel that a witness existed, which related to Mr. Gutierrez's testimony. An interpreter had been present at the time Gutierrez made a police report. When defense counsel learned of the witness in the middle of the trial, it was impossible to obtain the witness to testify as to the preparation of the police report.

4. The court ordered the prosecutor to stay away from a particular area in questioning. The prosecutor ignored the order and solicited answers from Sgt. Buckland relating to the evidence the Court had already ruled on. The trial court stated:

"The first motion is denied. Does other counsel want to join in the second motion that is relative to Mr. Marcus' persistence in asking the question after the Court had sustained the objection?

Mr. Stevens: The defendant Boyd will join in that, your Honor.

Mr. Elden: Join in that, your Honor.

The Court: Do you stipulate, Mr. Marcus?

Mr. Marcus: No your Honor.

The Court: Then this motion is denied also."

Clearly, the court felt that the conduct was so reprehensible, that it would have granted a mistrial had the prosecutor consented.

5. The prosecutor failed to disclose a witness by the name of Mr. Ten Eyck, after the court ordered him to do so. His testimony related to identification of Petitioner. Apparently, the prosecutor was not going to give the witness an opportunity for a pretrial line-up or show-up, but instead was planning on having the witness identify Petitioner because he was sitting at counsel table. Petitioner's counsel moved for a show-up which was permitted. The witness was unable to identify Petitioner and picked out a person different than any of the three defendants.

6. The court ordered the prosecutor not to refer to a truck which a codefendant had been driving. The prosecutor

violated this order. A motion for mistrial was made, at which time the court stated:

> "I think that your question was very improper. However, I don't feel that it was sufficient misconduct necessary to warrant the granting of the motion for mistrial and I will deny the motion."

7. The court ordered the prosecutor not to mention the label on any shirts that were recovered. The prosecutor violated the court's order and asked questions necessitating an admonishment.

Clearly, the prosecutor's repetitive disobedience of the court's rulings demonstrates intentional and deliberate misconduct.

The American Bar Association Standards Relating to the Administration of Criminal Justice provide, "The duty of the prosecutor is to seek justice, not merely to convict." American Bar Association Project on Standards For Criminal Justice, Standards Relating to the Administration of Criminal Justice, "The Prosecution Function," Section 1.1(c).

In Berger v. United States, 295 U.S. 78, at 87, the United States Supreme Court noted:

> "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law. The two-fold aim of which is that guilty shall not escape or innocent suffer. He may prosecute with earnestness and vigor, indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the case at bar, the conduct of the deputy district attorney was hardly that of a "servant of the law." Anything a prosecutor says or does has significant impact upon a jury. In People v. Talle, 111 Cal.App.2d 650, at 677, the Court, while speaking of argument to the jury noted:

> "Defense counsel are known to be advocates for the defense. Prosecuting

> attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with the prestige of that office."

Clearly, the areas of inquiry as well as the responses elicited by the prosecutor in the areas he was forbidden to go into were subject to weighty consideration by the jurors.

> "To the state the prosecuting attorney owes honesty and fervor in the performance of his official obligations as a prosecutor; his duty to the defendant is fairness. The public interests demand that a prosecution be conducted with energy and skill, but this prosecuting officer should see that no unfair advantage is is taken of the accused. . ."
>
> ". . .At the same time, it is his duty to hold himself under proper restraint and avoid violent partisanship, partiality and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled and it is as much his duty to refrain from improper methods calculated to bring about a wrongful conviction as it is the use of any legitimate means to bring about a just one." 63 Am.Jur.2d, 355, Prosecuting Attorneys, § 27.

In conclusion, the prosecutorial misconduct constituted three broad categories:

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In conclusion, the prosecutorial misconduct constituted three broad categories:

1) conflict of interest; 2) failure to provide discovery; and 3) wilful disobedience to court orders by bringing in extrinsic matters.

The California Supreme Court recently discussed the problem of a conflict of interest. In Comden v. Superior Court, 20 Cal.3d 906, the court held that the trial court did not abuse its discretion in ordering withdrawal of an attorney pursuant to California Rules of Professional Conduct, Rule 2-111(a)(4) when it appeared that a member of the attorney's firm ought to be called as a witness at the time of trial. The court stated that an attorney attempting to be both advocate and witness impairs his credibility as a witness and diminishes the effectiveness as a lawyer. The court emphasized that the prohibition attempts to avoid the appearance of attorney impropriety. The court noted,

> "When trial counsel foresees the possibility his continued representation of a client may fall within the prohibition of rule 2-111(a)(4) because he or a member of his firm ought to testify on behalf of such client at trial, he should resolve

> any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel."

In the case at bar, the deputy district attorney acted as investigator, going to the farms of the Kunicks' and Blackman's whose testimony as to identification of Petitioner was critical. In addition, the deputy district attorney placed himself in a position of becoming a witness when he was present at the time photo show-ups were demonstrated to the Kunicks. Clearly, this constituted a conflict of interest and was misconduct.

Secondly, the deputy district attorney repeatedly engaged in prosecutorial misconduct by failing to turn over discovery pursuant to a court order. This court has repeatedly held that failure to provide material evidence is misconduct. Brady v. Maryland, 373 U.S. 382, at 387; Giglio v. United States, 405 U.S. 105, 153. See also, United States v. Agurs, 427 U.S. 97, at 111, wherein the court held that the failure to voluntarily provide exculpatory matter to the defense constitutes error of constitutional dimension.

Finally, the deputy district attorney intentionally violated the trial court's orders several times by eliciting responses which the court had forbidden. In United States v. Whitmore, 480 F.2d 1154, at 1158, the court held that improper reference to extrinsic matters constitutes prosecutorial misconduct.

Clearly, as the Court of Appeal noted in its opinion, the prosecutor was subject to criticism for the manner in which he conducted the trial. Petitioner submits that pursuant to the foregoing authority, such conduct violated Petitioner's right to due process and a fair trial. Accordingly, Petitioner requests that a hearing be granted.

Respectfully submitted,
H. CLAY JACKE
Counsel for Petitioner

APPENDIX I

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, vs. ROBERT LYNN BOYD, Defendant and Appellant.	2d Crim. No. 30047 Sup.Ct.No. A313465 Court of Appeal Second Dist. F I L E D MAR 20 1978 Clay Robbins, Jr., Clerk

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APPEAL from judgment of the Superior Court of Los Angeles County. Stanley R. Malone, Jr., Judge. Affirmed as modified.

H. Clay Jacke for Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Edward T. Fogel, Jr., Gary R. Hahn, Deputy Attorneys General, for Respondent.

By amended information Robert Lynn Boyd, Albert William Pruitt and Michael Lester Clark were charged jointly with seven counts of grand theft in violation

of Penal Code section 487.1 (counts I-VII). In count VIII Boyd was charged with robbery in violation of Penal Code section 211 of one Efrain Gutierrez Mondreal. Boyd, Pruitt and Clark were also charged with nine counts of receiving stolen property in violation of Penal Code section 496 (counts IX-XVII).[1] Boyd was additionally charged with four prior convictions. Following trial by jury Boyd was convicted of one charge of grand theft (count IV), the one count of robbery (count VIII) and six counts of receiving stolen property (counts IX, X, XI, XIII, XIV and XVII). Having admitted the four prior convictions, Boyd was sentenced to the California Institution for Men.[2]

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[1] Pruitt was found not guilty on all counts and Clark convicted of only one count of receiving stolen property. Clark is not a party to this appeal.

[2] The judgment is in error wherein it shows sentence to the California Institution for Men. This clerical error will be corrected in this opinion. (People v. Thomas, 65 Cal.App.3d 854, 858.)

Contentions

It is contended on appeal that (1) evidence seized pursuant to a defective search warrant should have been suppressed,[3] (2) the vicinage requirement was violated in the jury selection process, (4) the failure of the trial court to suppress the use of two of the four charged priors denied the right of fair trial, (5) prosecutorial misconduct denied a fair trial and, (6) instructional error compels reversal.

Since it is not contended that the evidence is insufficient to sustain the convictions, a plenary statement of the evidence is not required in this unpublished opinion. We shall refer only to those portions of the record deemed necessary to a resolution of the issues.

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[3] Vicinage is defined in Black's Law Dictionary, Fourth Edition, as "Neighborhood near dwelling; vicinity. . . . In modern usage, it means the county where a trial is had, a crime committed, etc. . . . Also a jury of the county wherein trial is had. . . ."

[4] The extensive briefs, totaling 291 (continued)

Discussion

(1) With respect to the search warrant the following is disclosed by the record:

1. Prior to the original trial of this action oral motions by all three defendants to quash the search warrant were denied.

2. Prior to the original trial of this action motions made on behalf of all three defendants to suppress (Pen. Code § 1538.5) and to traverse the affidavit in support of the search warrant were granted. The court struck portions of the affidavit and granted the motion to suppress.

3. Upon petition by the People for writ of mandate the court of appeal, in case number 2d Civ. 46274, granted the writ and in a written opinion held, inter alia, that the trial court improperly

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[4] (continued)
pages, accurately summarize this voluminous record in sufficient detail to demonstrate to the court that the interests of all concerned have been given scholarly attention by all counsel.

struck those portions of the affidavit and directed that the trial court's suppression order be annuled.

4. Subsequently that order was vacated and a new order made denying the motions to traverse and suppress.

5. Thereafter trial was commenced and some six weeks later, on motion of defendants, a mistrial granted. A new trial was commenced April 12, 1976.

6. On June 30, 1976, defendants sought to reopen the section 1538.5 motions. The request was denied.

7. Much later in the trial three motions were made by codefendants to again renew the 1538.5 hearing based upon evidentiary developments during trial. Boyd did not join in the first two and expressly refused to join in the third.

8. Lastly, during discussions regarding the admission into evidence of exhibits, Boyd objected "on the ground that they are the product of an illegal search. . . ." The objection was overruled.

On appeal Boyd, relying upon Penal Code section 1538.5 subdivision (h),[5] again seeks to raise the suppression issue arguing that the failure of the trial court to grant a further full scale suppression hearing, after it developed during trial that the so-called "citizen-informants" referred to in the affidavit for search warrant (Mr. and Mrs. Kunick) were perhaps mis-labeled and were in fact "arms" or "tools" of the police, was error per se. It is further urged that the search warrant was based upon observations made by the officers in violation of the state and federal constitutional protection against unreasonable search and seizure (U. S. Const. 4th Amend; Cal. Const., art. I, § 13), in that the officers made an illegal warrantless entry onto and into defendant's premises by using bolt cutters to sever a chain across the driveway

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[5] This section provides:

"(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court."

for the purpose of arresting defendant and breaking and entering his residence, thus rendering their observations of the contraband seized without the ambit of the "plain sight" doctrine.

Assuming arguendo that defendant Boyd actually participated in the efforts to renew the suppression motions during trial, thus preserving his right to question the lower court's ruling on appeal, in itself a questionable conclusion on our part (see People v. Gallegos, 4 Cal.3d 242, 249-250 and People v. Cooper, 7 Cal.App. 3d 200, 205), we find the arguments in this court unpersuasive. Normally a defendant is entitled to one complete hearing on the suppression of evidence. (People v. Mardian, 47 Cal.App.3d 16, 37.) In People v. Superior Court (Edmonds), 4 Cal.3d 605, 609-611, our Supreme Court had occasion to discuss subsections (h) and (i) of section 1538.5 concluding:

> "Thus, defendant is permitted to renew, at a special hearing in the superior court held prior to trial, a motion to suppress which was previously denied at the preliminary hearing. However, no provision is made for renewing a motion to suppress at trial.

As we recently stated in People v. O'Brien, 71 Cal.2d 394, 403 [78 Cal. Rptr. 202, 79 Cal.Rptr. 313, 456 P. 2d 969], '[C]ontrary to the apparent understanding of the parties below, we construe the statute to prohibit the renewal of such a motion at trial if it has previously been made in pretrial proceedings. . . . By omitting the word "renew" from subdivision (h), the Legislature must have intended to limit the operation of that provision to instances in which the motion is "made" or "entertained" for the first time at trial. (Cf. Gomes v. Superior Court (1969) 272 Cal.App.2d 702, 706, fn. 9 [77 Cal.Rptr. 539].)' (See also People v. Superior Court, 10 Cal.App. 3d 477 [89 Cal.Rptr. 223]; People v. Lee, 3 Cal.App.3d 514, 524 [83 Cal. Rptr. 715]; but see People v. Municipal Court, 10 Cal.App.3d 539, 542-543 [89 Cal.Rptr. 243].)

According to committee reports prepared prior to the enactment of section 1538.5, the intent underlying that section was to reduce the unnecessary waste of judicial time and effort involved in the prior procedures, whereby search and seizure questions could be repeatedly raised in criminal proceedings. (22 Assembly Interim Com. Report No. 12 (1965-1967) p. 13, contained in Vol. 2 to Appendix to Journal of the Assembly (1967), hereafter "Assembly Reports.") Another acknowledged deficiency in the prior practice was the disadvantageous use of jury time resulting from the determination of search and seizure questions during the course of trial, thereby interrupting the trial's

continuity. (Assembly Reports, supra, p. 14.) A third consideration in favor of requiring pretrial determination of motions to suppress was to afford the prosecution an opportunity to obtain appellate review of adverse rulings before trial had commenced and jeopardy had attached. (Assembly Reports, supra, pp. 15-16.) Consequently, the proposed drafts of section 1538.5 each limited defendant's right to make a motion to suppress at trial to situations wherein he was either unaware of his grounds for suppression, or unable to so move at pretrial proceedings. (Assembly Reports, supra, p. 16.) Nevertheless, it was suggested that the trial judge should have discretion to entertain such a motion, made for the first time at trial, if defendant's failure to so move prior to trial was otherwise excusable. (Assembly Reports supra, pp. 16, 20, 31.) Accordingly, the last sentence of subdivision (h) was added to provide for the discretionary allowance of motions during trial. However, as indicated in People v. O'Brien, supra, 71 Cal.2d 394, that sentence does not authorize the renewal of motions, previously denied at pretrial proceedings.[6]

It should be emphasized that the O'Brien rule is limited to preventing the renewal of a prior motion to suppress, rather than the making of a new motion based upon grounds either unavailable or unknown to defendant at the time his prior motion was denied. (Pen. Code, § 1538.5, subd. (h).) Thus, for example, if there occurred

an intervening change in the applicable law or the discovery of new evidence in support of suppression, the trial court could entertain a new motion based upon such grounds. In the instant case, however, defendant asserted no new grounds in support of his renewed motion to suppress." (Fn. omitted.)

Defendant seeks to avoid the result in Edmonds, supra, by suggesting that the motion made during trial was a "new" motion based upon the so-called newly discovered evidence of the role played by the Kunicks in the investigation. Again, assuming arguendo that this evidence could be deemed newly discovered, a conclusion to which we do not subscribe, defendant fails to show by competent authority wherein to classify the Kunicks as other than citizen-informants would justify the granting of a motion to suppress.

When a police officer seeks evidence of a crime or contraband in plain sight and he is in a place where he has a right to be, no constitutional violation will be deemed to have occurred. (North v. Superior Court, 8 Cal.3d 301, 306; Dean v. Superior Court, 35 Cal.App.3d 112, 117; People v. Maltz, 14 Cal.App.3d 381, 397.)

It follows that even if Mr. and Mrs. Kunick actually were police officers, their observations of the Hacienda Ranch from their own property were lawful. Such observations include those with binoculars. (People v. Vermouth, 42 Cal.App.3d 353, 361-362.)

Furthermore, even if Mr. and Mrs. Kunick were not so-called citizen-informers, there still was ample probable cause. Information contained in the affidavit included observations and facts from several different police officers. Moreover, the information from Mr. and Mrs. Kunick consisted of different observations they had made independent of one another. Even an untested informant's information may be used to supply probable cause if the police, through independent investigation, find corroborating evidence. (People v. Golden, 20 Cal.App.3d 211, 217; People v. West, 3 Cal.App.3d 253, 256.) The instant affidavit contains ample corroborating information no matter how Mr. and Mrs. Kunick are classified.

Defendant's reliance upon People v. Rodriguez, 55 Cal.App.3d 498, with respect

to the characterization of the at-trial motion as new is misplaced since on April 15, 1976, the California Supreme Court ordered that case deleted from publication and is therefore not to be cited under rule 977, California Rules of Court.

Turning to the argument that evidence obtained under the search warrant should be suppressed because the underlying affidavit was based upon observations of the officers after an illegal entry onto the premises by cutting a chain across the driveway and a forceable entry made into the residence and bedroom thereof, it is recognized that another division of this court has ruled in this case that, having probable cause to arrest Boyd, the officers were legally on the premises at the time of the observation. It is suggested that the law of the case doctrine does not apply to foreclose further consideration of the matter on this appeal because the question of the legality of the forceable entry was not in issue in the mandate proceeding and that, even so, to apply the doctrine in the instant case would result in an "unjust decision." (People

v. Medina, 6 Cal.3d 484, 492.) We do not agree. After holding the officers had probable cause to arrest Boyd at the time of entry, this court then commented with respect to the entry as follows:

"The officers' method of entry at the gate by cutting the chain to enter the farm was not contested and not an issue in this writ. In any event the officers' conduct was proper and reasonable in that they had information that automatic weapon fire had been heard fired on the premises and since the distance between the gate and the house was across open ground, the officers had no alternative method of safely effecting entry.

There being probable cause to arrest Boyd as a matter of law, the excising of what the officers observed once they entered was error and upon being reinstated renders the affidavit proper, complete and sufficient to justify the issuance of the warrant."

The foregoing is the law of the case at least insofar as the entry onto the premises is concerned. As to the claim

of entry into the residence in violation of Penal Code section 844, we have no record of this issue having ever been raised in the court below. Therefore that issue cannot now be raised for the first time on appeal (People v. Shuey, 13 Cal.3d 835, 8470, particularly in the face of the failure to furnish a full record of the section 1538.5 hearing itself. (People v. Slocum, 52 Cal.App.3d 867, 879.)

In support of his "unjust decision" argument, defendant relies primarily on the rationale, if not the holding, of People v. Ramey, 16 Cal.3d 263, decided February 25, 1976, wherein it was held that warrantless arrests made within the home, in the absence of exigent circumstances, are per se illegal. Conceding that Ramey was determined by the Supreme Court to be applied prospectively only to arrests made subsequent to that decision becoming final, it is suggested that the Ramey rationale should nevertheless be applied retroactively compelling the conclusion that an application of the law of the case doctrine herein would per se result in an unjust decision in the instant case.

In the absence of other compelling reasons to so conclude, we decline to so do.

(2) Conceding that the point was not raised in the court below and lacks judicial precedent, it is argued that the concept of vicinage dictates that jurisdiction to hear the section 1538.5 motion was confined to San Diego rather than Los Angeles County because the search warrant was issued in San Diego County wherein lay the premises to be searched. Likening the unrest generated in the colonies from the issuance of writs of assistance by the King of England to search colonial properties in America, it is suggested that this court avoid an analogous situation today by holding that the motion must be heard by the magistrate who issued the warrant in accordance with Penal Code section 1538.5(b), which provides:

> "When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant."

Noting that this subdivision uses the permissive word "should" rather than the mandatory "shall" and is prefaced by the

words "[w]hen consistent with the procedures set forth in this section. . ," we perceive of no need or statutory requirement for injecting vicinage into the already complicated suppression hearing procedure in this case. Furthermore, it has not been suggested, much less shown, that defendant suffered prejudice by having the matter heard in Los Angeles rather than San Diego County.

(3) It is also argued that the denial of defendant's vicinage motion made during the jury selection process deprived him of his constitutional right to have the jury selected from a panel whose residence was in the judicial district wherein the crime was committed. The motion was directed at counts IX-XVII which charged that the receiving of the stolen property was in San Diego County.

Penal Code section 781 provides:

> "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any

> competent court within either jurisdictional territory."

Penal Code section 786 provides:

> "When property taken in one jurisdictional territory by burglary, robbery, theft, or embezzlement has been brought into another, the jurisdiction of the offense is in any competent court within either jurisdictional territory."

It appears clear from these sections that the Superior Court of California, County of Los Angeles, had subject matter jurisdiction over the crimes charged in all of these counts. With respect to vicinage our Supreme Court commented in People v. Bradford, 17 Cal.3d 8, 15-16, as follows:

> "Our venue statutes must be construed in light of the importance historically attached to vicinage. At common law, a defendant in a criminal action had a right to be tried by a jury drawn from the vicinage, i.e., the neighborhood, in which the alleged crime occurred. (People v. Powell (1891) 87 Cal. 348, 354-355 [25 P. 481].) The substance of this common law right is preserved in the federal Constitution, the Sixth and Fourteenth Amendments guaranteeing a defendant in a state criminal prosecution a right to be tried by a jury drawn from, and comprising a representative

cross-section of the residents of the judicial district in which the crime was committed. (People v. Jones (1973) 9 Cal.3d 546, 556 [108 Cal.Rptr. 345, 510 P.2d 705].) It is also reflected in section 777's provision that, except as otherwise provided by law, a criminal offense is to be tried in the judicial district in which it occurred.

The right of a criminal defendant to to be tried in the vicinage of the crime was interpreted so strictly at common law that, e.g., an offense committed partly in one county and partly in another was not prosecutable at all. (People v. Powell, supra, 87 Cal. at p. 358.) Section 781 of the Penal Code, providing that an offense committed partly in one jurisdiction and partly in another may be prosecuted in either, 'was intended to broaden criminal jurisdiction beyond the rigid limits fixed by the common law....' (People v. Powell (1967) 67 Cal.2d 32, 63 [59 Cal.Rptr. 817, 429 P.2d 137].)"

In People v. Mitten, 37 Cal.App.3d 879 at 884, the court said:

"Here the several accessories, acting in concert, were engaged in a single criminal objective, the clandestine disposal of evidence, in order that the principals to the homicide might 'avoid or escape from arrest, trial, conviction or punishment.' (See Pen. Code, §32.) Their offense, as accessories, was committed in part in Contra Costa County, in part in

Mendocino County, and in part in other counties.

Penal Code section 781 provides: 'When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory.'"

In commenting on the vicinage problem the court went on to say at page 885:

"Mitten's argument that the Contra Costa County proceedings were calculated to deny him '"the inestimable Privilege" of being tried in the vicinage' as reflected 'in many prerevolutionary documents and in the Constitution' is, we think, more properly addressed to the Legislature.

Penal Code section 781, permitting trial in any of the several counties in which a single crime is perpetrated is an expression of the state's policy. We find the statute to be a reasonable accommodation of the state's problem of crimes with multiple jurisdictional territories and defendnats, to the Sixth and Fourteenth Amendments' requirement of trial 'by an impartial jury of the State and district.'"

(Cf. People v. Jennings, 10 Cal.App.3d

712, involving receiving stolen property.)

For reasons set forth in People v. Powell, 40 Cal.App.3d 107, defendants' reliance upon People v. Jones, 9 Cal.3d 546, is misplaced. Our conclusion in this respect is best explained by reference to Powell, supra. Powell is the celebrated case involving the kidnapping of police officers in Los Angeles County and the murder of one of them in Kern County. In discussing the subject at hand this court made the following observations which we deem persuasive if not controlling of our conclusions on this issue:

> "Appellants also claim that they were deprived of their Sixth Amendment right to be tried by a jury of the 'district wherein the crime shall have been committed,' as interpreted in People v. Jones (1973) 9 Cal.3d 546, 554 [108 Cal.Rptr. 345, 510 P.2d 705]. This claim is distinct from the one decided by the Supreme Court on the previous appeal, which related only to venue. Strictly speaking, the Sixth Amendment right to a 'jury of the vicinage' refers to the geographical area from which the jury is summoned rather than to the place of trial, the venue. In practical effect, however, the summoning of a jury from

the vicinage usually requires that the venue be, at least in part, coterminous.[4] Thus, in California the requirement of section 198, subdivision 1, of the Code of Civil Procedure, that jurors be one-year residents of the county where they sit, would have made it difficult, to say the least, to have Kern County residents in a Los Angeles venire.

We are, of course, bound by the Supreme Court's interpretation of the vicinage clause of the Sixth Amendment, insofar as it may be relevant to the facts of this case. Jones involved charges of selling marijuana. (Health & Saf. Code. § 11531.) According to the proof the offenses were committed entirely within the Central District of the Los Angeles County Superior Court. For certain administrative reasons the case was tried in the southwest district of that court, from which district alone the jurors were drawn. Applying the vicinage clause of the Sixth Amendment in the context of that prosecution, the court held that '. . . the rule quite simply is that a criminal defendant is entitled to a jury drawn from a jury panel which includes jurors residing in the geographic area where the alleged crime occurred.'[5] (Id. p. 554.)

At the oral argument of this appeal, the People conceded that the seriousness of their Sixth Amendment problem arises from the following facts:

1. Although California statutory provisions concerning venue were

satisfied even if only prelminary acts were accomplished in Los Angeles County, such preliminary acts do not necessarily satisfy the Sixth Amendment test set forth in People v. Jones, supra, which speaks of juries drawn from the 'geographical area where the alleged crime occurred.'

2. Although there is a tremendous amount of evidence, direct and circumstantial, that elements of the crime of first degree murder were committed in Los Angeles County, the evidence to that effect is not 100 percent compelling. Thus, if the intention to take Campbell's life was not formed until the party reached Kern County and if the taking of any of the victims' property in Los Angeles County was not accompanied by the required animus furandi (cf. People v. Butler (1967) 65 Cal.2d 569, 573 [55 Cal. Rptr. 511, 421 P.2d 703]), all the actual elements of first degree murder took place in Kern County.

3. The jury was never asked to resolve the conflict in the evidence.

4. Therefore, to rule in favor of the People on appellants' Sixth Amendment point requires us to hold that a jury venire from which Kern County residents were systematically excluded - as, of course, they were by virtue of section 198, subdivision 1, of the Code of Civil Procedure - did not violate the Sixth Amendment under any view of the facts of this case.

We so hold. The factual situation in Jones was not even remotely similar

to the one at bar, where a Los Angeles kidnaping directly and inexorably led to a Kern County execution, whether or not clemency was still in the cards when the county line was crossed. Jones involved three sales of marijuana. Each offense was confined to an intracounty judicial district from which no prospective jurors were drawn. The district where the case was tried and which furnished the entire venire had no connection whatever with the alleged crimes; it merely had an available courtroom. We feel certain that the conviction would not have been set aside on 'vicinage' grounds if, for example, Jones had journeyed into the southwest district for the specific purpose of procuring the marijuana later sold in the central district.

In Jones the Supreme Court was faced with the difficult problem of applying what was originially conceived as a right against the federal government in the context of a state criminal prosecution. After all, we do not have 'districts' - the geographical territories mentioned in the Sixth Amendment - nor are we really faced with the evil which appears to have triggered the vicinage clause; the removal of prisoners for trial in England.[6] Clearly, it was not confronted with the issue which we face: whether it is a violation of the Sixth Amendment to confine the summoning of jurors to a geographical area in which every act

preliminary to the actual crime was committed, but in which the elements which technically constitute the crime did not occur.

Whatever may be the answer to that question from a constitutional point of view, it is clear that as a practical matter a slavishly literal reading of Jones - '. . . area where the alleged crime occurred.' (Id. p. 554.) (Italics added.) - would either nullify the ameliorative provisions of section 781 of the Penal Code as interpreted and applied in People v. Powell (1967) 67 Cal.2d 32, 62-63 [59 Cal.Rptr. 817, 429 P.2d 137], or require the importation of jurors from one county into another - a practice in violation of section 198, subdivision 1, of the Code of Civil Procedure.

We do not believe that Jones compels either result. From a constitutional point of view, the combined effect of the two California code sections is merely that we have divided the State into 'districts' as defined in section 781 of the Penal Code, permitting trials to take place in any county which forms part of such a 'district';[7] further, we have provided that the jury is to be drawn exclusively from such county of trial, even if only certain preliminary acts take place in such county. If that means that for Sixth Amendment purposes California interprets the word 'crime' as including preliminary acts which satisfy the venue requirement

of section 781 of the Penal Code, so be it. If we consider that in the federal context Congress is free to redistrict at its pleasure and to define crimes in such a way that defendants can be tried in districts with which they do not have the remotest connection,[8] we are satisfied that no constitutional right of appellants was violated here." (Fns. omitted.) (People v. Powell, 40 Cal.App.3d 107 at 120-123.)

Defendant attempts to distinguish Powell on the basis that in that case the crimes were committed by the same persons and there was established a continuing course of action from one county to the other. No effort is made to explain why the distinction as to persons is material. Whatever the distinction in this respect, we fail to see wherein it is destructive of our reliance thereon. It is argued that:

"In the instant case, there were no facts presented sufficient to establish appellant had engaged in a continuing course of action. The jury believed the appellant had committed some acts of theft and of robbery in Los Angeles County and criminal offenses in the

County of San Diego. Those offers of evidence that were accepted by the jury as facts, resulting in their verdicts, were not sufficient facts to establish a continuing course of action from Los Angeles County to San Diego County."

We do not agree. As pointed out by the People at pages 104-106 of the reply brief, there is substantial evidence in the record to establish a continuing course of action consisting of the theft of property in Los Angeles County which was transported and received in San Diego. Thus preliminary acts essential to the crime of receiving stolen property were initiated in Los Angeles County, as was found to be the case in Powell, supra.[6]

(4) It is now argued that the trial court's refusal to suppress the use of

[6] In passing we note that this same vicinage issue was raised prior to trial by petition for writ of mandate which was denied out of hand by another division of this court and that a petition for hearing was also denied by the Supreme Court.

two of the four charged priors (one for forgery in 1972 and the other for burglary in 1968) was instrumental in defendant not testifying in his own defense, thus depriving him of a fair trial. We have examined the record in this respect and find no reversible error in the trial court's ruling on this Beagle[7] motion. We need not belabor the point. The fundamental argument advanced by defendant is thoroughly discussed and answered by the People in the reply brief at pages 108-113. It would serve no purpose in this unpublished opinion to reiterate same herein. Suffice to say the principles enunciated in Beagle were adhered to. The prior burglary and forgery convictions were not remote, were relevant to credibility and were for different crimes than the charged offenses. Even if it could be said the burglary prior should have been excluded from use for impeachment purposes, defendant's trial counsel admitted the prior forgery conviction would still have been available for impeachment. The error, if any,

[7] People v. Beagle, 6 Cal.3d 441.

was not prejudicial. (People v. Watson, 46 Cal.2d 818, 836.)

(5) It is also argued that prosecutorial misconduct, characterized as "reprehensible methods," denied a fair trial. We have examined the record with respect to defendant's many claims of prosecutorial misconduct and the manner in which the incidents were handled by defense counsel and the court. While we must admit that the prosecutor was subject to criticism for the manner in which certain phases of the trial were conducted, we are satisfied that such irregularities did not amount to the degree of dishonesty, deception or reprehension contemplated by the cases. (Cf. People v. Strickland, 11 Cal.3d 946, 955; People v. Benjamin, 52 Cal.App.3d 63, 80.) Furthermore, it does not appear that all of the claims of error now claimed on appeal to have resulted from the misconduct were preserved by proper assignment of error and requests for instructions for the jury to disregard same. A mere objection is ordinarily insufficient to raise the issue on appeal. (People v. Barrow, 60

Cal.App.3d 984, 995; People v. Gilliam, 41 Cal.App.3d 181, 194-195.) We have concluded from our examination that the instant record reflects that the trial court proceeded with abundant caution during this lengthy and complex case. Moreover, the deputy district attorney's conduct can hardly be termed "reprehensible." The trial court was very careful to exclude what it deemed to be improper evidence. Defendant in fact points to very little actual evidence which allegedly improperly came before the jury. The mere fact that numerous motions or objections were made by defense counsel fails to establish erroneous tactics by the prosecution when the record reflects that most of the motions were without substance or were resolved by means of evidentiary hearings outside the presence of the jury. Defendant's rights to a fair trial were fully preserved. He has not established the existence of prejudice in light of the overwhelming evidence against him.

(6) Finally, it is contended that the trial court committed error in refusing

to give certain instructions requested by defendant pertaining to photographic identification procedures employed by the prosecution.

In addition to being instructed generally as to the People's burden of proving a defendant guilty beyond a reasonable doubt, the jury was instructed, at defendant's request that:

> "The burden is on the State to prove beyond a reasonable doubt that the defendant is the person who committed the offense with which he is charged. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of defendant as the person who committed the offense before you may convict him. If from the circumstances of the identification, you have a reasonable doubt whether defendant was the person who committed the offense, you must give the defendant the benefit of that doubt and find him not guilty."

and, at the request of the People that:

> "this court has found as a matter of law that the photographic line-up viewed by Mrs. Kunick on January 16, 1975 was conducted in an unduly suggestive manner.
>
> You are further instructed that you may consider Mrs. Kunick's in-court identification of one or more

> of the defendants if you find that this identification was not a result of the photographic line-up. You must disregard Mrs. Kunick's in-court identification of one or more of the defendants if you find that her in-court identification is a result of this phtographic line-up."

Defendant contends that the refusal to give the following additional instructions was error when considered in connection with the identification made by the witness Gutierrez:

> "Whenever a witness makes a courtroom identification of a defendant as a person who committed an act, you are not permitted to consider such identification for any purpose, unless you are convinced beyond a reasonable doubt that the identification is based upon the witness' memory of the person who committed the act at the time the act occurred, as distinguished from seeing the defendant or his picture at a line-up or any other occasion after the act occurred and before the courtroom identification."
>
> "You are instructed that a photographic line-up is unfair when it suggests in advance of the identification by the witness the identity of a person or persons suspected by the police of committing the charged crime."

"The prosecution has the burden of proving beyond a reasonable doubt that the physical identification procedures used by the prosecution were not unfair. If you find the said procedures to be unfair in that they were impermissibly suggestive, then you should disregard such identification testimony."

It requires no citation of authority that the trial court need not give incorrect instructions. The first and second of the three instructions refused were clearly incorrect instructions. In-court identification need not be based upon the witness' memory at the time of the act. It is not subject to suppression unless prior identification procedures were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (People v. Rodriguez, 68 Cal.App.3d 874, 881.) It was therefore not error to refuse these instructions. It is also not error to refuse to give repititious instructions. (People v. Scola, 56 Cal. App.3d 723, 728.) We believe the third requested instruction was basically repititious of the principle contained in

the instructions given. While perhaps not so in its entirety, no showing has been made that its refusal has resulted in a miscarriage of justice. We are satisfied from our examination of the entire cause that it is not reasonably probable that a result more favorable to defendant would have been reached had this instruction been given as offered. (People v. Watson, supra, 46 Cal.2d 818, 834-836.)

The judgment is modified to provide that defendant is sentenced to state prison for the term prescribed by law. As modified, the judgment is affirmed.

NOT FOR PUBLICATION.

ALLPORT, Acting P. J.

We concur:

POTTER, J.

FAINER, J.*

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* Judge of the Superior Court of Los Angeles County, assigned by the Chairperson of the Judicial Council.

APPENDIX II

POST CARD

CLERK'S OFFICE
Court of Appeal
SECOND DISTRICT
3580 WILSHIRE BOULEVARD
SUITE 301
LOS ANGELES, CA 90010

H. CLAY J ACKE, J.D.

3306 WEST VENICE BLVD.

LOS ANGEIE S, 90019

California

APR 12 19[redacted]

Los Angeles, Cal. _____, 19____

TITLE { PEOPLE / BOYD } No. 30047

THE COURT: PETITION FOR REHEARING IS DENIED.

PETITION FOR REHEARING DENIED.

CLAY ROBBINS, *Clerk*

© ocp

APPENDIX III

POST CARD

CLERK'S OFFICE
Court of Appeal
SECOND DISTRICT
3580 WILSHIRE BOULEVARD
SUITE 301
LOS ANGELES, CA 90010

H. CLAY J ACKE, J.D.

3306 WEST VENICE BLVD.

LOS ANGELES, 90019

California

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 13 1978

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 30047

People

vs.

Boyd

Respectfully,

G. E. BISHEL
Clerk

57371-877 1-78 3M OSI